

KEENAN G. WILKINS,)	No. C 14-2516 LHK (PR)
)	
Plaintiff,)	ORDER OF PARTIAL
)	DISMISSAL; ORDER OF
v.)	SERVICE; DIRECTING
)	DEFENDANTS TO FILE
ALAMEDA COUNTY, et al.,)	DISPOSITIVE MOTION OR
)	NOTICE REGARDING SUCH
Defendants.)	MOTION
)	

DISCUSSION

Order of Partial Dismissal; Order of Service; Directing Defendants to File Dispositive Motion or Notice Regarding Such Motion
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1 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

2 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
3 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
4 the alleged violation was committed by a person acting under the color of state law. *See West v.*
5 *Atkins*, 487 U.S. 42, 48 (1988).

6 B. Legal Claims

7 In the complaint, plaintiff alleges that the custom and policy at Alameda County jails
8 denied plaintiff the opportunity to make confidential and privileged telephone calls to his
9 attorney and religious advisor. When plaintiff used the phone, he was required to do so on a
10 monitored and recorded telephone which was located in an area where other inmates and sheriff
11 officials could listen to plaintiff's side of the conversation. Alameda County has a rule book that
12 states that inmates consent to monitored and recorded conversation if they choose to use the
13 telephone. Plaintiff claims there is no notice or information that any confidential or private
14 phone is available for detainees to use.

15 In December 2009, plaintiff became aware that it was unconstitutional for officials to
16 record his confidential and privileged phone calls. Plaintiff filed an administrative grievance
17 requesting that officials stop doing so. In August and October 2010, plaintiff alleges that when
18 he was on the phone with his attorney and his religious advisor, plaintiff noticed that he no
19 longer received the automated recording warning the speakers that the conversation was being
20 monitored and recorded.

21 Liberally construed, plaintiff has stated a cognizable claim that defendants Alameda
22 County, and supervisors Sheriff Ahern, Captain Ayala, Commander Harris, Captain Wilkinson,
23 Captain Kennedy, Captain Gomez, and Deputy Delgadillo violated plaintiff's right to due
24 process.

25 Plaintiff further asserts that Alameda County and Sheriff Ahern violated plaintiff's right
26 to equal protection because (1) other pretrial detainees were provided confidential telephone
27 access to their attorneys and religious advisors; (2) Alameda County and Sheriff Ahern had a
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1 policy that only pro per litigants could use private, secluded, and non-monitored phones, while
2 represented litigants had to use a telephone in a public space; (3) Alameda County and Sheriff
3 Ahern had a policy that only criminal defendants represented by the Alameda County Public
4 Defender's Office could make free, non-collect phone calls to their attorneys, while inmates
5 represented by court-appointed or retained counsel had to call collect; (4) Alameda County and
6 Sheriff Ahern had a policy that criminal pro per inmates could make a reasonable number of free
7 telephone calls if they were associated with an ongoing case, while civil pro per inmates could
8 not use the confidential and non-collect telephones; and (5) Alameda County and Sheriff Ahern
9 had a policy to allow only illiterate pro per litigants to use the typewriter while literate litigants,
10 such as plaintiff, were not permitted to do so.

11 Liberally construed, plaintiff has stated cognizable claims that Alameda County and
12 Sheriff Ahern violated plaintiff's right to equal protection.

13 Plaintiff also appears to raise a claim that his First Amendment right to access the courts
14 was violated. (Compl. at 18-20.) Specifically, plaintiff asserts that because he was a civil
15 litigant, he was not allowed to use the "confidential phone," and was required to use the "collect
16 call" phone in a non-private area. On the other hand, criminal pro per litigants were permitted to
17 use the "confidential phone" and "non-collect" phone in a confidential area. A right to telephone
18 calls may arise from the right of access to the courts. Prisoners are guaranteed under the
19 Fourteenth Amendment the right to adequate, effective and meaningful access to the courts, of
20 which the right of access to counsel is an essential component. *See Bounds v. Smith*, 430 U.S.
21 817, 820, 822-23 (1983). To state a denial of access claim, however, plaintiff must state facts
22 that he suffered an actual injury, and that the defendants' actions "hindered his efforts to pursue
23 a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Plaintiff has not done so.

24 Accordingly, this First Amendment right to access the court is DISMISSED with leave to
25 amend.

26 It is unclear whether plaintiff is attempting to raise a Sixth Amendment right to counsel
27 and First Amendment right to religious freedom claim. If he is, plaintiff must take care to allege
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1 who violated which right, and allege sufficient facts to create a causal connection between each
2 defendant's action and the alleged violation. To the extent plaintiff is trying to raise a Sixth
3 Amendment right to counsel and First Amendment right to religious freedom claim, as the
4 complaint currently reads, these claims are DISMISSED with leave to amend.

5 Plaintiff further alleges that the defendants violated 42 U.S.C. § 1985. Section 1985
6 covers conspiracies to interfere with certain civil rights and contains three subparts. As a general
7 matter, plaintiff has not alleged facts sufficient to support the allegation that any of the individual
8 defendants conspired together. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621,
9 626 (9th Cir. 1988) ("A claim under this section must allege facts to support the allegation that
10 defendants conspired together. A mere allegation of conspiracy without factual specificity is
11 insufficient."). Here, plaintiff has not pled any facts from which the court can reasonably infer
12 that defendants formed an agreement to violate plaintiff's civil rights.

13 Nonetheless, even assuming that an inference of an agreement can be made, out of an
14 abundance of caution, the court will evaluate whether plaintiff's § 1985 allegations state a claim
15 under any of the three subparts of that statute. Section 1985(1) provides a cause of action for
16 preventing or impeding an officer of the United States from performing his or her duties. Here,
17 plaintiff cannot state a claim under § 1985(1) because the statute's protection extends
18 "exclusively to the benefit of federal officers," *Canlis v. San Joaquin Sheriff's Posse Comitatus*,
19 641 F.2d 711, 717 (9th Cir. 1981), of which plaintiff is not.

20 Section 1985(2) contains two clauses. In order to support an action under the first clause
21 of 42 U.S.C. § 1985(2), plaintiff must demonstrate that (1) there was a conspiracy, (2) to deter a
22 witness by force, intimidation, or threat from testifying, which (3) results in injury to the
23 plaintiff. *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987). Plaintiff does not
24 concern deterrence of a witness from testifying. Thus, plaintiff has not alleged facts to support a
25 claim under the first clause of § 1985(2).

26 The second clause of § 1985(2) provides a cause of action for conspiracy to obstruct
27 justice in the state courts "with intent to deny to any citizen the equal protection of the laws." 42
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U.S.C. § 1985(2). An allegation of racial or class-based animus is an essential requirement of a claim under this clause. *See Bretz v. Kelman*, 773 F.2d 1026, 1028-29 (9th Cir. 1985) (en banc). Here, plaintiff does assert a claim that defendants violated his right to equal protection. However, plaintiff's allegations demonstrate that plaintiff is not asserting any racial or class-based animus, but claims based on litigant status and literacy. *See, e.g., United Broth. of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 837-39 (1983) (Section 1985 does not reach economic animus); *Eitel v. Holland*, 787 F.2d 995, 1000 (5th Cir. 1986) (pro se plaintiffs do not constitute a "class"). Thus, plaintiff has not alleged facts to support a claim under the second clause of § 1985(2).

Finally, "[t]o bring a cause of action successfully under § 1985(3), a plaintiff must demonstrate a deprivation of a right motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002) (internal quotation marks omitted); *Butler v. Elle*, 281 F.3d 1014, 1028 (9th Cir. 2002) (recognizing that the Supreme Court has not defined what constitutes a "class" beyond race). Again, plaintiff's allegations distinguish between pro se and represented litigants, and literate versus non-literate litigants; however, plaintiff's allegations do not even hint at a racial or class-based claim. Accordingly, plaintiff's § 1985 claim is DISMISSED. Because "it appears beyond doubt that the plaintiff can prove no set of facts in support of" his § 1985 claim which would entitle him to relief, the dismissal is without leave to amend. *See Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007) ("Dismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.").¹

Plaintiff also claims that defendants violated 42 U.S.C. § 1986. "Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation. A claim can be stated under section 1986 only if the complaint

¹ Because defendant Global Tel Link is named only in conjunction with plaintiff's § 1985 claim, Global Tel Link is also DISMISSED.

contains a valid claim under section 1985.” *Karim-Panahi*, 839 F.2d at 626. However, because plaintiff has failed to sufficiently allege a claim under § 1985, plaintiff’s § 1986 claim is also DISMISSED without leave to amend.

Plaintiff also names Captain Miles, Captain Buchanan, Alameda County District Attorney Nancy O’Malley. However, Captain Miles and Captain Buchanan are Internal Affairs Representatives and District Attorney Nancy O’Malley is a prosecutor. Plaintiff’s only allegations against them are that he notified them to seek assistance regarding the “unconstitutional practices” of Alameda County, but all three failed to act. Even assuming that any of these three individuals were supervisors, plaintiff may not sue supervisory officials on a theory of respondeat superior. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“Government officials may not be held liable for the unconstitutional conduct of their subordinates on a theory of respondeat superior”). “[A] plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Id.* A supervisor “is only liable for his or her own misconduct,” and is not “accountable for the misdeeds of [his or her] agents.” *Id.* at 676-77. Mere knowledge of a subordinate’s alleged misconduct is insufficient. *Id.* at 676-77. Plaintiff does not allege any facts showing that Captain Miles, Captain Buchanan, or District Attorney Nancy O’Malley were personally involved in the actions that allegedly caused harm to plaintiff, or that they had any duty to act. Rather, plaintiff only alleges that these defendants failed to react to his complaint about the incidents. Thus, the claims against these defendants are DISMISSED with leave to amend.

Plaintiff further names Lt. Arone, Deputy Smith, Deputy Mitchell, and Deputy Martinez. With respect to Lt. Arone, plaintiff alleges that plaintiff served a “citizens arrest under state law” requesting that Lt. Arone place six of the named defendants under arrest for violating California Penal Code § 636.² (Compl. at 7-8.) Lt. Arone gave the citizen arrest papers to Captain Ayala,

² That section provides, in part:

“(a) Every person who, without permission from all parties to the conversation, eavesdrops on or records, by means of an electronic device, a conversation, or any portion thereof, between a

1 who informed plaintiff that the arrests would not be made because the allegations were
 2 unfounded. (*Id.* at 8.) Plaintiff asserts that Lt. Arone violated state law by failing to make the
 3 arrests, and violated plaintiff's right to equal protection and due process. However, a violation
 4 of state law is not cognizable to state a claim under § 1983. Moreover, plaintiff's assertions of
 5 "equal protection" and "due process" are too conclusory to link Lt. Arone to a cognizable federal
 6 claim. Accordingly, Lt. Arone is DISMISSED from this action with leave to amend. Plaintiff
 7 also fails to sufficiently link Deputies Smith, Mitchell, and Martinez with a constitutional
 8 violation. *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) ("[a] plaintiff must
 9 allege facts, not simply conclusions, that show that an individual was personally involved in the
 10 deprivation of his civil rights."). In the complaint, plaintiff merely states that these three
 11 defendants were "directly responsible for claims 1-5" or "directly acted and conspired" with
 12 other officials to deprive plaintiff of constitutional rights. (Compl. at 27.) However, a defendant
 13 cannot be held liable simply based on his membership in a group; rather, each individual
 14 defendant's participation in unlawful conduct must be shown. *See Chuman v. Wright*, 76 F.3d
 15 292, 294-95 (9th Cir. 1996). Accordingly, Deputies Smith, Mitchell, and Martinez are
 16 DISMISSED from this action without prejudice. If plaintiff wishes to amend his complaint to

18 person who is in the physical custody of a law enforcement officer or other public officer, or
 19 who is on the property of a law enforcement agency or other public agency, and that person's
 20 attorney, religious adviser, or licensed physician, is guilty of a felony punishable by
 imprisonment pursuant to subdivision (h) of Section 1170.

21 (b) Every person who, intentionally and without permission from all parties to the conversation,
 22 nonelectronically eavesdrops upon a conversation, or any portion thereof, that occurs between a
 23 person who is in the physical custody of a law enforcement officer or other public officer and
 24 that person's attorney, religious adviser, or licensed physician, is guilty of a public offense. This
 25 subdivision applies to conversations that occur in a place, and under circumstances, where there
 26 exists a reasonable expectation of privacy, including a custody holding area, holding area, or
 27 anteroom. This subdivision does not apply to conversations that are inadvertently overheard or
 28 that take place in a courtroom or other room used for adjudicatory proceedings. A person who is
 convicted of violating this subdivision shall be punished by imprisonment pursuant to
 subdivision (h) of Section 1170, or in a county jail for a term not to exceed one year, or by a fine
 not to exceed two thousand five hundred dollars (\$2,500), or by both that fine and
 imprisonment."

1 allege sufficient facts linking these defendants to a constitutional violation, he may do so within
2 thirty days.

3 CONCLUSION

4 1. Plaintiff's 42 U.S.C. §§ 1985 and 1986 are DISMISSED without leave to amend.
5 Defendant Global Tek Link is DISMISSED.

6 2. Plaintiff's claims of a violation of the First Amendment right to access the courts,
7 First Amendment right to religious freedom, and Sixth Amendment right to counsel are
8 DISMISSED with leave to amend. Defendants Captain Miles, Captain Buchanan, District
9 Attorney Nancy O'Malley, Lt. Arone, Deputy Smith, Deputy Mitchell, and Deputy Martinez are
10 dismissed with leave to amend. If plaintiff can cure the pleading deficiencies described above,
11 he shall file an AMENDED COMPLAINT within **thirty days** from the date this order is filed.
12 The amended complaint must include the caption and civil case number used in this order (C 14-
13 2516 LHK (PR)) and the words AMENDED COMPLAINT on the first page. The amended
14 complaint must indicate which specific, named defendant(s) was involved in each cause of
15 action, what each defendant did, what effect this had on plaintiff and what right plaintiff alleges
16 was violated. Plaintiff may not incorporate material from the prior complaint by reference. If
17 plaintiff files an amended complaint, he must allege, in good faith, facts - not merely conclusions
18 of law - that demonstrate that he is entitled to relief under the applicable federal statutes.
19 **Failure to file an amended complaint within thirty days and in accordance with this order**
20 **will result in the court automatically proceeding with only the cognizable claims and**
21 **defendants named in this order.**

22 3. The clerk of the court shall mail a Notice of Lawsuit and Request for Waiver of
23 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint
24 and all attachments thereto (docket no. 1), and a copy of this order to **Alameda County, Sheriff**
25 **Gregory J. Ahern, Captain James Ayala, Deputy R. Delgadillo, Commander La Donna**
26 **Harris, and Captain Gomez at the Glenn Dyer Detention Facility, and Captain Wilkinson**
27 **and Captain Carla Kennedy at the Santa Rita Detention Facility.**
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1 The clerk of the court shall also mail a courtesy copy of the complaint and a copy of this
2 order to the Office of County Counsel, 1221 Oak Street, Suite 450, Oakland CA 94612.
3 Additionally, the clerk shall mail a copy of this order to plaintiff.

4 4. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure
5 requires them to cooperate in saving unnecessary costs of service of the summons and complaint.
6 Pursuant to Rule 4, if defendants, after being notified of this action and asked by the court, on
7 behalf of plaintiff, to waive service of the summons, fail to do so, they will be required to bear
8 the cost of such service unless good cause be shown for their failure to sign and return the waiver
9 form. If service is waived, this action will proceed as if defendants had been served on the date
10 that the waiver is filed, and defendants will not be required to serve and file an answer before
11 **sixty (60) days** from the date on which the request for waiver was sent. Defendants are asked to
12 read the statement set forth at the bottom of the waiver form that more completely describes the
13 duties of the parties with regard to waiver of service of the summons. If service is waived after
14 the date provided in the Notice but before defendants have been personally served, the Answer
15 shall be due **sixty (60) days** from the date on which the request for waiver was sent or **twenty**
16 **(20) days** from the date the waiver form is filed, whichever is later.

17 5. No later than **sixty (60) days** from the date the waiver is sent, defendants shall file
18 a motion for summary judgment or other dispositive motion with respect to the cognizable
19 claims in the complaint.

20 Any motion for summary judgment shall be supported by adequate factual documentation
21 and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants**
22 **are advised that summary judgment cannot be granted, nor qualified immunity found, if**
23 **material facts are in dispute. If defendants are of the opinion that this case cannot be**
24 **resolved by summary judgment, they shall so inform the court prior to the date the**
25 **summary judgment motion is due.**

26 6. Plaintiff's opposition to the dispositive motion shall be filed with the court and
27 served on defendants no later than **twenty-eight (28) days** from the date defendants' motion is
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1 filed. Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and
2 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must
3 come forward with evidence showing triable issues of material fact on every essential element of
4 his claim).

5 7. Defendants shall file a reply brief no later than **fourteen (14) days** after plaintiff's
6 opposition is filed.

7 8. The motion shall be deemed submitted as of the date the reply brief is due. No
8 hearing will be held on the motion unless the court so orders at a later date.

9 9. All communications by the plaintiff with the court must be served on defendants
10 or defendants' counsel, by mailing a true copy of the document to defendants or defendants'
11 counsel.

12 10. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
13 No further court order is required before the parties may conduct discovery.

14 11. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
15 and all parties informed of any change of address and must comply with the court's orders in a
16 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
17 pursuant to Federal Rule of Civil Procedure 41(b).

18 IT IS SO ORDERED.

19 DATED: 32184236



LUCY H. KOH
United States District Judge